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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

DATE: MAY 31 2011 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), a member of the professions holding an advanced degree. The petitioner, a Ph.D. student at the time of filing, did not complete part 6 of the petition regarding the proposed employment. In response to the director's request for additional evidence, the petitioner proposed to work as a postdoctoral fellow in the Department of Mechanical & Aerospace Engineering at the University of Missouri, upon completion of his Ph.D. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief, a copy of the decision and a copy of a decision for a different client that counsel asserts is similar, purportedly demonstrating the director's failure to consider the individual record. Both decisions, however, include information specific to the self-petitioners. The use of similar language to address similar deficiencies is not evidence that the director failed to evaluate the specifics of the petitioner's petition. This decision will address counsel's other concerns below. For the reasons discussed below, the petitioner has not demonstrated his eligibility for the benefit sought. Specifically, the question is not whether the petitioner's occupation benefits the United States. Rather, at issue is whether the proposed benefits of the petitioner's employment in the United States outweighs the national interest inherent in the alien employment certification process such that the petitioner should be exempt from that process.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)

> that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Master's degree in Engineering from the National Chiao Tung University in Taiwan. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The AAO uses the term "prospective" to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The director concluded that the petitioner works in an area of intrinsic merit, mechanical engineering. On appeal, counsel asserts that the director incorrectly characterized the petitioner's field, which counsel asserts is cryobiology and cryopreservation technology research. The petitioner's undergraduate and Master's degree are both in mechanical engineering. As of the date of filing, he was a Ph.D. student at the University of Washington under the direction of a professor in the university's Department of Mechanical Engineering. The petitioner is a member of the American Society of Mechanical Engineers (ASME). The job offer in the record is from the University of Missouri's Department of Mechanical and Aerospace Engineering. Thus, the director did not err in describing the petitioner's field as mechanical engineering, especially as the record does not establish that the petitioner will continue working on cryopreservation techniques at the University of Missouri. Nevertheless, *NYSDOT,* 22 I&N Dec. at 217 described that alien's field of endeavor as "engineering of bridges." Thus, it may be more precise to characterize the petitioner's field of endeavor on the date of filing as mechanical engineering of cryopreservation techniques. The distinction, however, becomes more important when considering the proposed benefits of the petitioner's work.

The director concluded that the proposed benefits of the petitioner's work would be national in scope without stating what those benefits would be. The proposed benefits of the petitioner's work are improved cell preservation and manipulation techniques. Such benefits have the potential to be national in scope. It would bolster the petitioner's claim, however, if the petitioner had demonstrated that his work at the University of Missouri would continue with cryopreservation techniques.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, U.S. Citizenship and Immigration Services (USCIS) generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

As stated above, the petitioner is a member of ASME. The record also establishes that the beneficiary is also a student member of the Society for Cryobiology. Professional memberships are one type of evidence that a petitioner may submit to establish exceptional ability. 8 C.F.R.

§ 204.5(k)(3)(ii)(E). Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on professional memberships, while relevant, are not dispositive to the matter at hand. *Id.* at 222. The petitioner did not submit evidence that either membership in ASME or student membership in the Society for Cryobiology is indicative of a degree of influence in the field.

The petitioner submitted evidence that he is a trustee on the Executive Board of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). The petitioner did not explain how his service for this union is indicative of his influence in the fields of mechanical engineering or cryobiology.

In response to the director's request for additional evidence, the petitioner submitted evidence that he served on the organizing committee for an ASME conference in 2009. This service postdates the filing of the petition and cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

Similarly, the petitioner submitted correspondence between him and other researchers inquiring about his exact methodology, all of which postdates the filing of the petition. Regardless, the petitioner has not established that this correspondence exceeds the typical professional correspondence that is continually ongoing between members of the same field.

The petitioner initially submitted six published articles and several conference presentations. In response to the director's request for additional evidence, the petitioner submitted evidence that independent researchers have cited one of the petitioner's articles twice and have cited another one of his articles once. All of the citations postdate the filing of the petition. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Thus, the director did not err in stating that the petitioner's work had yet to garner citations as alleged by counsel on appeal.

On appeal, counsel asserts: "the AAO has never determined that citations are the exclusive evidentiary basis for determining national impact." Counsel then refers to a "long line of decisions" where the AAO found a sufficient national impact despite a limited number of citations. Counsel notes that the petitioner provided copies of some of these decisions in response to the request for additional evidence. Counsel acknowledges that these decisions are unpublished but asserts they "establish a long line of adjudicatory standards with respect to the types of evidences that can establish national impact."

While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. That said, the AAO concurs with counsel that a lack of citations does not preclude a finding that the petitioner has influenced the field. Nevertheless, it remains the petitioner's burden to demonstrate his influence in the field through the submission of some type of evidence.

The record contains one patent and two patent applications listing the petitioner as a co-inventor. Original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7. The patent and pending patents are all assigned to the University of Washington. The record contains no evidence that the university has licensed the technology to other institutions or laboratories or even that independent research teams have expressed an interest in licensing the technology.

[redacted], the petitioner's Ph.D. advisor at the University of Washington, asserts that the petitioner has "outstanding research skills and extensive experience in the microfluidic fabrication techniques." It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

[redacted] continues:

> [The petitioner's] research concerns numerical and experimental studies of heat and energy transfer in cell preservation technology with a very unique and important application in the fundamental study of water molecules and cryoprotective agents (CPAs, chemicals protecting cells and tissues from injuries in ultra-low temperatures) and cryopreservation of living cells and tissues. Without successful cryopreservation techniques, living cells and tissues can not be preserved before transfusion. Also, tissues and organs are not able to be stored and transported from city to city, from state to state. [The petitioner's] work addresses some of the most difficult and important health problems facing the United States, including bone marrow transplantation, umbilical cord blood cryopreservation, etc.

Assertions as to the overall importance of an alien's area of expertise cannot suffice to establish eligibility for a national interest waiver. *Id.* at 220.

[redacted] notes that the petitioner was listed as first author of three 2008 publications presenting "fundamental and novel findings in applied physics, thermodynamics and biopreservation technologies, respectively." [redacted] further notes that the petitioner submitted other manuscripts for possible publication. Work that has yet to be published cannot demonstrate an influence in the field. Moreover, while publication demonstrates dissemination in the field, at issue is the impact once disseminated in the field.

More specifically, [redacted] explains that the petitioner "devised a novel method that uses microfluidic technology to help characterize the optimal cryopreservation protocols for leukemia cells and immune cells" to prevent cell damage during freezing and thawing. [redacted] concludes that this technique "provides a way to develop an optimal method, which means the most economic and sufficient way,

that widely benefits the healthcare in the US." [redacted] provides no examples of any independent research team using or pursuing the petitioner's technique.

[redacted] further explains that one of the petitioner's articles describes "a microfluidic device to manipulate particles based on their sizes." According to [redacted], the petitioner's device is less damaging to cells by preventing clustering. [redacted] concludes: "I expect that he will make further discoveries and expand the already huge potential of this microfluidic device" and lists the processes in which the petitioner's device can be incorporated. Once again, [redacted] does not provide examples of any independent laboratory using the petitioner's device. Thus, his predictions appear speculative. [redacted] a research associate professor at the University of Washington, provides similar information to that in [redacted] letter.

[redacted] in Washington State, asserts that he has been collaborating with the petitioner on a cryopreservation project. Specifically, [redacted] explains that the petitioner's microfluidic device "can be readily operated by clinical researchers, and help determine the key cell membrane properties in minutes for further optimization of cell preservation protocols so that valuable cell samples will survive with the highest viabilities in preservation." [redacted] then discusses the next phase of this project during which time the petitioner developed and integrated a cryo-microscopic system with seeding availability. [redacted] concludes that the experimental data from this project "will revolutionize the understanding of how biological samples survive the cryopreservation processes." This statement is speculative. While [redacted] discusses the importance of retaining the petitioner's services on this project, it cannot be ignored that the petitioner was a student at the time and proposed to accept employment at the University of Missouri upon graduation.

The record contains other letters from local collaborators in Washington State. [redacted], Scientific Director of Cell Therapy at the Puget Sound Blood Center, asserts that she collaborated with the petitioner "on several projects that are relevant to the field of stem cell transplantation." Specifically, she asserts that her laboratory is working with the petitioner to design a bioreactor that facilitates the release of platelets from mature megakaryocytes. [redacted] characterizes the petitioner's device as "unique and impressive" but fails to explain how it is being used in the field.

[redacted] a staff scientist at the Fred Hutchinson Cancer Research Center in Seattle, asserts that he collaborated with the petitioner's department to study transgenic mice utilizing Intracytoplaxmic Sperm Injection (ICSI) technology. [redacted] asserts that the petitioner "creatively and successfully developed [a] new technique to deliver genetic material to mouse embryos using a novel microinjection device, which makes the entire procedure to be simplified, more efficient and low cost." [redacted] concludes that the petitioner's process "would significantly speed up gene manipulation and genetic disease animal model development." This statement, which is not supported by examples of independent uses of the petitioner's process, is speculative.

Finally, as noted by counsel on appeal, the record does contain letters from independent references. [redacted], a professor at the University of Michigan, explains that he met the petitioner when visiting the University of Washington. [redacted] asserts that the petitioner's protocols for preserving leukemia samples "cannot be implemented using traditional mechanical manufacturing with its limited resolution." Thus, [redacted] concludes that the petitioner's skills are "indispensable to addressing critical problems in cell-level and sub-micron scales." [redacted] provides no examples of independent laboratories using the petitioner's protocols with leukemia samples and does not claim to be doing so himself.

[redacted] provides a similar letter, concluding that the petitioner's work "undoubtedly will lead to the discovery of better cryopreservation protocols for dendritic cells and other cell types of interest that will improve the health of people all over the country." [redacted] does not suggest General BioTechnology is using the petitioner's protocols or seeking to license the petitioner's patented or patent-pending innovations.

[redacted] Project Leader at the University of California, San Diego, provides general praise of the petitioner's expertise and asserts: "it would be a mistake to replace [the petitioner] with a less productive, less skilled researcher." Any objective qualifications necessary for the performance of the occupation can be articulated in an application for alien employment certification. *NYSDOT,* 22 I&N Dec. at 220-21. Thus, the alien employment certification process would not require an employer to accept an under-qualified US worker even if available. [redacted], a senior doctor and research scientist at the University Medical Center in Hamburg, provides examples of how the petitioner's protocols could be used, but does not provide examples of how they are already being used or investigated outside Washington State.

[redacted], an associate professor at the University of Alberta, asserts that the petitioner has "had an important impact on our understanding of how cells and tissues respond to the chemical and physical changes that occur during freezing and drying." While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] the University of Missouri, states that the petitioner "has developed much of the cutting-edge technology being used in this area." [redacted] does not explain, however, who is actually using the technology.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction

of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of skill and innovation without providing specific examples of how those innovations have influenced the field. Merely repeating the legal standards does not satisfy the petitioner's burden of proof.[1] The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

Ultimately, the petitioner was, at the time of filing, a Ph.D. student who had published six articles, presented his work, and appeared as an inventor on a patent and two patent applications. While the petitioner's innovations are viewed as having potential, the record lacks evidence that the petitioner's innovations had already influenced the field as of the date of filing. Moreover, the record does not satisfactorily establish that the petitioner intends to keep working in the area where he proposed to benefit the national interest, cryopreservation.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

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[1] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.